Editor's note: Reconsideration granted; decision sustained in part, vacated in part, and remanded -- See Mary A. A. Aspinwall (On Rreconsideration), 66 IBLA 367 (Aug. 27, 1982)

MARY A. A. ASPINWALL

IBLA 76-88 Decided January 16, 1976

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting Alaska Native allotment application AA-6578.

Affirmed.

1. Alaska: Native Allotments

   Land patented to the State of Alaska pursuant to the Act of January 21, 1929, 45 Stat. 1091, is no longer in Federal ownership and is not available for an Alaska Native allotment.

2. Alaska: Native Allotments

   A BLM State Office decision rejecting an Alaska Native allotment application will be affirmed when the applicant has failed to submit satisfactory proof of substantially continuous use and occupancy of any land.

APPEARANCES: Donald E. Clocksin, Esq., and Richard Svobodny, Esq., of Alaska Legal Services Corp., Juneau, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Mary A. A. Aspinwall appeals from the June 2, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting her Native allotment application AA-6578. That decision was based on a lack of evidence of use and occupancy and the fact that the land applied for is no longer under the jurisdiction of the United States.

Appellant's allotment application, dated October 30, 1971, describes the land both by metes and bounds and as the S 1/2 SW 1/4 of surveyed section 27 and the N 1/2 NW 1/4 of protracted section

34, all in T. 30 S., R. 58 E., C.R.M. Appellant stated that she had occupied the land since her birth in 1938. Appellant described her use of the land as berrypicking during the summer from 1958 to 1961. She listed no improvements.

The BLM field examination occurred on October 28, 1972. The field examiner reported that he found no evidence of use or occupancy other than a marked spruce tree, which he determined was the southwest corner of appellant's parcel. The field examiner also reported that he met with the appellant at her home in Juneau, at which time she stated that the last time she was on the land was 1958, and that all her use of the land was during her childhood years when she was under her parents' care and guidance.

The State Office informed appellant in March 1975 that her application would be rejected unless she supplied additional information in support of her claim within 60 days. She did not submit evidence of use and occupancy, but she did protest the description of her parcel by BLM as entirely within section 27. The State Office then rejected her application because appellant had not occupied the land as contemplated by the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970). The State Office further stated: "Examination of the allotment shows it to be entirely within section 27, T. 30 S., R. 58 W., Seward Meridian." Because section 27 had been patented to the State of Alaska on February 18, 1955, by virtue of Clear List No. 2 pursuant to the Act of January 21, 1929, 45 Stat. 1091, the State Office concluded that the land was no longer within its jurisdiction and that the application must be rejected for this reason also.

Prior to filing this appeal, appellant requested that the State Office vacate its decision for three reasons: first, she applied for land in section 34 as well as in section 27; second, the decision incorrectly identified the parcel as located in T. 30 S., R. 58 W., Seward Meridian, when it should be T. 30 S., R. 58 E., Copper River Meridian; and third, she filed an affidavit stating that she used the land almost every year for berrypicking and that the statements attributed to her by the field examiner are incorrect. On appeal, appellant requests that her case be remanded to the State Office for the same reasons.

[1] The Alaska Native Allotment Act, 43 U.S.C. § 270-1 (1970), authorizes the Secretary of the Interior "to allot * * * vacant, unappropriated, and unreserved nonmineral land in Alaska" to Natives as described in that statute. Any land which has been patented to the State of Alaska pursuant to the Act of January 21, 1929, 45 Stat. 1091, is not available to Native allotment applicants. The ownership of such land has passed from the United States to the State and this Department no longer has jurisdiction

over such land. Thomas Albert, 20 IBLA 338 (1975). Thus, appellant cannot receive any land which is located in section 27, T. 30 S., R. 58 E., C.R.M., as part of her allotment. 1/

[2] In order to receive any part of her parcel which is in section 34, appellant must show, by satisfactory proof, "substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. § 270-3 (1970); 43 CFR 2561.2(a). This use and occupancy must be as an independent citizen for herself or as the head of a family, and not as a child with her parents. Elsie Bergman, 22 IBLA 233, 235 (1975). Use of the land by ancestors may not be included to establish an applicant's qualifications for an allotment. John Picnalook, 22 IBLA 191 (1975).

Appellant indicated in her application that she used the land for berrypicking from 1958 to 1961. In her affidavit, she asserts that any statement made by her to the BLM field examiner in 1972 is incorrect, and that she has used the land every year except 1961. We are left with inconsistent and contradictory statements regarding appellant's use and occupancy of the land. She has failed to submit satisfactory proof of substantially continuous use and occupancy of any land. Her inconsistent statements cannot be viewed as credible evidence of the required use and occupancy. Accordingly, there is no need for any further inquiry into possible discrepancies in the land descriptions.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Joan B. Thompson
Administrative Judge

We concur:

_____
Newton Frishberg
Chief Administrative Judge

_____
Frederick Fishman
Administrative Judge

_____

1/ The mistaken township description contained in the State Office decision should be corrected, but is not a substantive error. The land patented to the State of Alaska was in T. 30 S., R. 58 E., Copper River Meridian. All other documents in the case file, including the BLM field report, refer to the correct range and meridian.